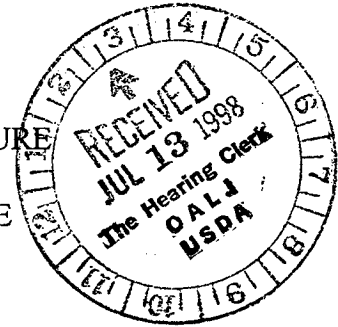


UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE



In re:	)	P. & S. Docket No. D-97-0003
	)	
Hugh T. Hennessey, d/b/a	)	
Hennessey Cattle Co.,	)	
Sixes River Cattle Co.,	)	
Earnest A. Bussmann, and	)	
Peter E. Bussmann,	)	
	)	
Respondents	)	Decision and Order

**Preliminary Statement**

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented ("the Act") (7 U.S.C. § 181 *et seq.*). The proceeding was instituted on October 24, 1996, by a Complaint filed by the Acting Deputy Administrator of the Packers and Stockyards Programs, Grain Inspection, Packers and Stockyards Administration, United States Department of Agriculture ("USDA"). The Complaint alleges that Respondents entered into an agreement with the purpose or effect of restricting competition by controlling prices with respect to the sale of slaughter cattle in the Willamette Valley region of Oregon, in willful violation of sections 312(a) of the Act and 201.70 of the regulations.

Respondents filed Answers denying all material allegations. I conducted a hearing in Portland, Oregon, on February 24 through 26, 1998. Complainant was represented by Andrew Y. Stanton. Sixes River Cattle Co., Earnest A. Bussmann, and Peter E. Bussmann were represented by G. Lance Salladay, Boise, Idaho. Hugh T. Hennessey appeared *pro se*.

The parties filed post-hearing briefs, proposed findings of fact, proposed conclusions of law and reply briefs. The last such brief was filed on June 30, 1998. All proposed findings of fact, conclusions of law, and arguments have been considered. To the extent indicated, they have been adopted. Otherwise, they have been rejected as irrelevant or not supported by the record. The hearing transcript is cited herein as "Tr." Complainant's exhibits are cited as "CX" and Respondents' exhibits are cited as "RX."

### **Findings of Fact**

1. Respondent Sixes River Cattle Company ("Sixes River") is an Oregon corporation whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Sixes River was engaged in the business of a dealer, buying and selling livestock in commerce for its own account or the account of others, and as a market agency, buying on consignment; and was duly registered with the Secretary of Agriculture as a dealer and a market agency (Answer, ¶ 1; Tr. 118-19). At all times material, George Bussmann was the sole stockholder and president of Sixes River (Tr. 347, 489).

2. Respondent Earnest A. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Earnest Bussmann was the manager of Sixes River, and was responsible for the direction, management and control of its business operations (Tr. 451, 488-89, 589-90, 603).

3. Respondent Peter E. Bussmann is an individual whose business mailing address is P.O. Box 272, Langlois, Oregon 97450. At all times material, Peter Bussmann was an employee of Sixes River. Due to a heart condition, Peter Bussmann's duties at Sixes River were limited and consisted primarily of attending the Lebanon Auction Livestock Sale every Thursday to sell feeder

cattle owned by Bussmann Brothers and to purchase feeder and slaughter cattle for Bussmann Brothers and Sixes River. Occasionally, Peter Bussmann would take feeder cattle that he did not sell at Lebanon to the Corvallis auction on the following day. Corvallis held an auction every Friday (Tr. 226-29, 452-54, 460, 589-96, 598-99, 618).

4. The Lebanon auction sale was less stressful than other sales because very few, if any, other buyers generally attended that auction. Also, after the Lebanon sale, Peter Bussmann was able to spend the night in the area and return to Sixes River the next day (Tr. 454-56, 460).

5. The Corvallis auction sale is more stressful than the Lebanon auction sale as it is regularly attended by several buyers; and Peter Bussmann must return to Langlois the same day as the sale at Corvallis because Sixes River needs the trailer back at Langlois to pick up cattle on Saturdays. Corvallis is approximately a 4-hour drive from Langlois, Oregon (Tr. 292, 341, 455-56).

6. Respondent Hugh T. Hennessey ("Hennessey"), doing business as Hennessey Cattle Co., is an individual whose business address is 6883 70<sup>th</sup> Avenue, S.E., Salem, Oregon 97301. Hennessey, at all times material, was engaged in the business of a dealer, buying and selling livestock in commerce for his own account or the account of others, and a market agency, buying on commission; and was duly registered with the Secretary of Agriculture as a dealer and as a market agency (CX 1, 2).

7. Sixes River hired Hennessey as a commissioned buyer to purchase slaughter cattle on its behalf at various stockyards in north-central and northern Oregon and southern Washington. During the material time period, Hennessey was also a buyer for Armour Meat Company and Walt's Meats. Hennessey was authorized only to buy extra-fat, or "gobby" cows for Sixes River, whereas

he purchased choice, high-quality slaughter cows for Armour and mid to high-quality animals for Walt's Meats (Tr. 32, 120, 165, 177, 279-80, 293-94, 342, 452, 460, 600-01).

8. Sixes River buys gobby cows in order to resell them to Beef Packers, Inc. ("BPI"). Gobby cows are considered to be the least desirable type of slaughter cattle. There is a very limited market for gobby cows. BPI is the only packer in the area that processes such cattle (Tr. 301, 304, 401, 409, 456-57).

9. One of the auctions that Hennessey regularly attended was the Corvallis auction on Fridays. Peter Bussmann also occasionally attended the Corvallis auction in order to sell feeder cattle left over from the Lebanon auction on the previous day. Peter Bussmann would sometimes also purchase a few feeder cows at Corvallis if he saw a good deal. At Corvallis, the small feeder calves are sold first, cow/calf pairs are sold second, bred cows third, large feeder cattle fourth, and slaughter cattle are sold last. Peter Bussmann would not always leave the sale immediately after the feeder cattle were sold, and would sometimes be present during the sale of slaughter cattle. Peter Bussmann would not bid during that portion of the auction, however, because Hennessey was present to bid on slaughter cattle for Sixes River (Tr. 219-20, 228, 279, 281, 297-98, 454-58, 490, 587-88, 598-600, 607).

10. There were 11 occasions during the weekly sales between July 1994 and July 1995, when both Hennessey and Peter Bussmann were present at the Corvallis Auction, with each bidding on at least one animal. In some instances, Peter Bussmann did not purchase any cattle but only bought back his own to prevent a sale at too low a price (CX 7-14, 16-18; Tr. 490-91).

11. The Corvallis auction was regularly attended by several buyers other than Mr. Hennessey, including Kenneth Hale, Chris Bartel, and Terry Cowert (Tr. 127-29, 219, 280, 484-85).

12. Irving Hanger is the owner of Corvallis Auction Yard, however, he rarely attended sales (Tr. 320). He has serious medical problems, as well as a problem with alcohol abuse (Tr. 627). Sales at Corvallis were instead managed by Mr. Hanger's son, John Hanger, who testified that sales were competitive at all times material to the Complaint (Tr. 295-96). In addition, the Corvallis Auction Yard did not engage in any market support activities in order to protect its consignees during that time period (Tr. 164, 295-96, 365-68).

### **Conclusions of Law**

1. Respondents did not engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with buying or selling cattle in violation of section 312(a) of the Packers and Stockyards Act (7 U.S.C.A. § 213(a)).

2. Respondents conducted their buying operations in competition with and independently of other packers and dealers similarly engaged in accordance with section 201.70 of the regulations (9 C.F.R. § 201.70).

### **Discussion**

The Complaint alleges that Respondents engaged in a scheme to restrict competition by controlling prices, in wilful violation of § 312(a) of the Act and § 201.70 of the regulations.

Section 312(a) of the Act provides that:

It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the

stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

7 U.S.C.A. § 213(a).

Section 201.70 of the regulations requires that:

Each packer and dealer engaged in purchasing livestock, in person or through employed buyers, shall conduct his buying operation in competition with, and independently of, other packers and dealers similarly engaged.

9 C.F.R. § 201.70.

Neither the Act nor the regulations define the terms “unfair,” “unjustly discriminatory,” or “deceptive.” Their meaning must be determined by the facts of each case, taking into account the purposes of the Act. *Spencer Livestock Comm’n v. Dep’t of Agriculture*, 841 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1988). Accordingly, Courts have held that in order to prove a violation of section 312(a) of the PSA, a complainant must show that the challenged conduct is likely to produce the sort of injury the Act is designed to prevent. *See, e.g., Spencer Livestock Comm’n v. Dep’t of Agriculture*, 841 F.2d 1451, 1454 (9<sup>th</sup> Cir. 1988); *Bosma v. United States Dep’t of Agriculture*, 754 F.2d 804, 808 (9<sup>th</sup> Cir. 1984); *Central Coast Meats, Inc. v. United States Dep’t of Agriculture*, 541 F.2d 1325, 1327 (9<sup>th</sup> Cir. 1976).

The type of injury that is sought to be prevented by prohibiting failure to compete in section 201.70 of the regulations, is the removal of a buyer from the market who would otherwise be there. *Central Coast Meats, Inc. v. USDA*, 541 F.2d 1325, 1327 (9<sup>th</sup> Cir. 1976). In the instant case, that did not occur and was not likely to occur. It is important to note that Complainant does not challenge the fact that Mr. Hennessey was purchasing cattle for several principals. Rather, Complainant

maintains that it is not permissible for Peter Bussmann and Hennessey as representatives of the same principal to both be present at these auctions without bidding against each other.

Essentially, Complainant's argument is that with Bussmann present, Hennessey could have bid on the gobby cows for Armour or Walt's Meats, thus increasing competition and by not doing so, they decreased competition. Although Complainant repeatedly asserts that there was a strong market for gobby cows and that both Armour and Walt's Meats wanted those animals, the record does not support that claim. The evidence shows that there was only one competitor for gobby cows, BPI.<sup>1</sup> That fact would not change simply because Peter Bussmann happened to be present at Corvallis auction sales.

In addition, Hennessey was not the only buyer at the Corvallis auction. Any of the other buyers could have bid on the gobby cows, but did not. Armour or Walt's Meats could have sent additional buyers if they had wished to compete with Sixes River for the gobby cows.

Furthermore, Courts have generally held that proof of actual or likely harm to competition is necessary to find a violation of the Act.<sup>2</sup> See, e.g., *Swift & Co. v. Wallace*, 105 F.2d 848 (7<sup>th</sup> Cir. 1939); *Berigan v. United States*, 257 F.2d 852 (8<sup>th</sup> Cir. 1958), *Aikens v. United States*, 282 F.2d 53 (10<sup>th</sup> Cir. 1960), *Armour Co. v. United States*, 402 F.2d 712 (7<sup>th</sup> Cir. 1968), *Farrow v. USDA*, 760 F.2d 211 (8<sup>th</sup> Cir. 1985). The evidence does not show any actual or likely harm to competition

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<sup>1</sup>Not only did other witnesses testify to this (Tr. 301, 304, 401, 409, 456-57) but Complainant's own investigators acknowledged that they failed to ascertain that there were any other competitors in the area for gobby cows (Tr. 177, 337-39).

<sup>2</sup>Some courts have allowed a lesser showing of injury to competitors. See *Wilson and Co. v. Benson*, 286 F.2d 891 (7<sup>th</sup> Cir. 1961), *Swift & Co. v. United States*, 393 F.2d 247 (7<sup>th</sup> Cir. 1968). Complainant has failed to meet even this standard, as the record is devoid of any evidence of injury to any of Respondents' competitors.

resulting from Hennessey and Bussmann not bidding against each other. John Hanger, the auctioneer at Corvallis, testified that the activity at Corvallis during the relevant period was consistent with a competitive market; and there were no market support activities employed, which would have indicated a depressed market.

The only evidence indicating any harmful effect on competition is an affidavit given by Irving Hanger, the president of the Corvallis Auction Yard. Mr. Hanger stated in relevant part that:

When I started in 1973, there was good competition for slaughter cows with numerous packers both large and small in the area. Over the years, competition has changed. I don't remember exactly when Tip Hennessey began buying for Armour here but he soon was buying most of the top cows for that account. Pete Bussmann had the order for Beef Packers Incorporated in California and they took the top cows also. Before too long Tip was buying for BPI and Bussmann was at the sale as a spectator. When the sale was over, Tip would come into the sales office and mark the cows to Sixes River, Pete Bussmann's dealer firm, and that has become a regular occurrence at my market. I never asked Bussmann why or how this arrangement came about but it has had effects on competition and the prices for slaughter cows.

CX 19 at 2.

However, Irving Hanger's statement with respect to Peter Bussmann's presence at the auctions and the level of competition at the auctions is entitled to little weight. The evidence indicates that Irving Hanger rarely attended the Corvallis auctions and that his perceptions may have been affected by his problem of alcohol abuse (Tr. 320, 627). Furthermore, his statements are contained in an affidavit which was not subject to cross-examination. I, therefore, accorded much more weight to the testimony of the auctioneer on the scene, John Hanger, and others who concluded that the market at Corvallis was competitive.

The Ninth Circuit has found violations in the absence of injury to competition, but only where the conduct at issue was *per se* proscribed. See *Spencer Livestock*, *supra* at 1454; *Bosma*,



*supra* at 808-09. Here, that is not the case. There is no statute or regulation that prohibits a principal from attending an auction where it has a buyer present, or from sending more than one representative to an auction. Nor is there any case law which definitively proscribes such activity under all circumstances. Complainant relies on two Departmental cases that did find violations of the Act where a principal and agent both attended auctions without bidding against each other. Those cases are, however, distinguishable.

In *In re Jesse Amaral, Sr.*, 36 Agric. Dec. 872 (1977), the judge found that the respondents had competed for the same types of animals prior to the purchasing agreement and that the agreement did result in the loss of a competitor from the marketplace. The principal was a qualified buyer who regularly attended the auctions anyway; and, furthermore, one of the respondents admitted that the arrangement was entered into for the purposes of restricting competition and lowering prices. *Id.* at 887-88. In *In re San Jose Valley Veal*, 34 Agric. Dec. 966 (1975), the principal and agent also both regularly attended the auctions and were both qualified cattle buyers; and again both would have been competing for the *same* veal calves in the absence of the purchasing arrangement. However, in the instant case, no one else was interested in the gobby cows.

In addition, both cases were marked by the absence of any valid reason for hiring an agent, which helped lead to the inference that the purchasing arrangements were entered into for the purpose of reducing competition. In the instant case, Peter Bussmann did not regularly attend the Corvallis Auction Sale which explains why Sixes River hired Hennessey.

During the time period of July 1994 to July 1995, Peter Bussmann only attended 11 of the approximately 50 weekly auctions at Corvallis and during those dates he often did not remain for the sale of slaughter cattle. Complainant makes light of Bussmann's heart condition, arguing that

he really was not concerned about his health since he only reduced his activities instead of ceasing work altogether; and that he, therefore, could have regularly attended the Corvallis auction. The uncontroverted testimony, however, indicates that Peter Bussmann has a serious heart condition. As a result of that condition, he reduced his work activities by attending one auction each week instead of five auctions. The auction that he attended at Lebanon was the least stressful for him to attend, as there were less buyers competing for cattle. Also, he was also able to spend the night after the Lebanon auction and travel home the next day, further reducing the stress involved.

The evidence further shows that Peter Bussmann only attended the Corvallis auction when necessary to sell feeder cows left over from the Lebanon sale. While there, he would occasionally also buy a few feeder cows. His instructions from Sixes River and Earnest Bussmann were to return home as soon as possible after the feeder sale. It was not always possible, however, for Bussmann to leave immediately as it took time to complete the paperwork and arrange for animals to be loaded onto the trailer. In addition, Bussmann occasionally liked to stay to socialize with people with whom he had worked for so many years. As such, he would not always be gone by the time the sale of slaughter cattle began. Under these circumstances, it cannot be inferred, as it was in *Amaral* and *San Jose Valley Veal*, that there was any anticompetitive intent in entering into the purchasing arrangement.

More importantly, unlike *San Jose Valley Veal* and *Amaral*, there was no loss of a competitor from the marketplace when Hennessey took over bidding for Sixes River. Hennessey purchased different types of cattle for each of the principals that he represented. Although Complainant asserts that Hennessey could have bid on gobby cows for Armour and Walt's Meats, there is no evidence to support the contention that they or anyone else sought this type of animal.

The great weight of the evidence, therefore, supports the conclusion that Peter Bussmann ceased to regularly attend the Corvallis auction due to health concerns, and that, as a result, Hennessey was hired to purchase gobby cows in his stead. The evidence further indicates that this arrangement did not adversely affect competition at the Corvallis sale.

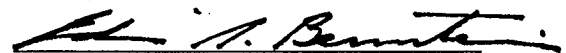
Based on these facts, Respondents' activities were not unfair or deceptive. They did not adversely affect competition, nor were they likely to. More importantly, the purchasing arrangement did not remove a competitor from the marketplace who would otherwise have been there. Therefore, it cannot be said that Respondents caused the type of harm that the Act was designed to prevent. Accordingly, Respondents have not violated the Act or the regulations.

#### **Order**

The Complaint is dismissed.

This Decision and Order shall become final without further proceedings 35 days after service hereof unless appealed to the Judicial Officer within 30 days after service pursuant to section 1.145 of the Rules of Practice (7 C.F.R. § 1.145).

July 13, 1998



EDWIN S. BERNSTEIN  
Administrative Law Judge